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No. 90-1972

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN H. WILLIAMS, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether an indictment may be dismissed without prejudice, pursuant to the district court's supervisory powers, when the government withholds from the grand jury substantial exculpatory evidence negating an essential element of the offense charged.

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BRIEF OF RESPONDENT

JURISDICTION

The jurisdiction of the Court has been invoked by petitioner under Title 28, U.S.C., Section 1254(1).

STATEMENT OF THE CASE

The Dismissal

On October 19, 1988, the district court dismissed the indictment without prejudice. The basis of the court's decision was that the government had withheld substantial exculpatory information from the grand jury "on perhaps the most crucial element [intent to defraud] of

the crime charged . . . . " Pet. App. 26a. The court concluded that the failure to present that evidence rendered the grand jury's decision to indict "gravely suspect." *Id.* The district court had previously denied respondent's dismissal motion but, upon respondent's request that it be reconsidered in light of circumstances which had developed, changed its prior ruling and entered the dismissal order. Pet. App. 19a-26a.[1]

[1] The district court entered its order granting the motion to reconsider on October 17, 1988, the first day of trial. The court delivered its ruling from the bench following evidentiary hearings and oral arguments in connection with respondent's motion in limine and motion to reconsider, as well as the Government's Memorandum of Law on Variance of Proof (filed October 14, 1988). The "variance of proof" issue arose from the prosecution's belated assertion that its trial evidence would show under Count V of the indictment that respondent "actually falsely stated his yearly income to be $350,000 [rather than $199,176.00]." *Id.* at 1 (emphasis in original). This position was particularly noteworthy with respect not only to the variance issue, but also with regard to the prospect of dismissal because (i) the government did not allege in Count V (or in any other count relating to respondent's income statements) that respondent misstated his "yearly income," (ii) the figure to which the government alluded in Count V ($199,176.00) was the interest income component of respondent's total income for 1984, (iii) respondent's general ledgers and tax returns established that respondent did in fact receive and report $199,176.00 in interest income for calendar 1984, and (iv) the government's awkward effort to describe a "variance" undoubtedly resulted from its attempt to cope with the infirmities of an indictment which resulted from a presentation to the grand jury which was not only incomplete, but based on erroneous assumptions.

Proceedings Prior to Dismissal

Prior to the grand jury proceedings, the government had investigated respondent's banking transactions and financial statements for more than a year. The government obtained, through several subpoenas, access to substantial materials relating to respondent, as well as information from attorneys and parties involved in respondent's Chapter 11 bankruptcy proceeding. Appendices I, II and III, filed Oct. 3, 1988. The bankruptcy proceedings involved non-dischargeability claims in which substantial discovery had been conducted. The government obtained pleadings in the adversary proceedings, as well as documents and transcripts of depositions and hearings. *See, e.g.*, Addendum to Resp. Br. on appeal ("Add."), exs. A and B. The adversary proceedings included actions prosecuted by the banks referred to in the indictment to obtain determinations of non-dischargeability with regard to their claims against respondent. Therefore, the discovery in the adversary proceedings, which specifically related to the banks' claims of fraud and respondent's denial of any such fraud, involved exactly the same factual issues as those raised by the indictment.

Respondent was subpoenaed by the grand jury, but only to introduce documents. The subpoena, *id.* ex. A, specifically provided that it could be satisfied by production of documents. Respondent was never requested to testify. The government proceeded to obtain the documents subpoenaed, and others, from the trustee in bankruptcy or his counsel. Included in that material was respondent's five (5) volume deposition taken in the

adversary proceedings,[2] which contains detailed explanations of respondent's financial statements and the assets which the government claimed to be worthless. Complete copies of respondent's deposition testimony were submitted to the district court in connection with its consideration of respondent's dismissal motion.

On June 27, 1988, the United States Attorney, in response to a request for documents made by respondent's counsel, wrote a letter acknowledging respondent's request for "copies of transcripts of depositions taken in numerous civil cases, which involve directly, or indirectly, John Williams, Jr." *Id.* ex. C. The United States Attorney stated:

> It is our understanding that the above enumerated documents do not contain any *Brady* material. It is further our understanding that the above-referenced material will not be used as government exhibits in the pending criminal case. Moreover, the documents appear generally to be irrelevant to the issues presented by the indictment.

Id. at 1.[3]

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[2] A separate subpoena was issued by the government for the five volume transcript. *Id.* ex. B.

[3] Curiously, the government's brief on appeal took the position that "all of the information the defendant contends the Grand Jury should have received from his civil deposition was conveyed to the Grand Jury by other witnesses." Gov't Br. on App. at 30. The government did ultimately designate, contrary to the representations made by the United States Attorney, select portions of respondent's deposition testimony for use at trial. Add. ex. N.

On July 1, 1988, respondent filed a motion to compel disclosure of exculpatory evidence. J.A. 47-51. The government responded on July 15, 1988, stating that it was aware of its duty to provide respondent with such evidence, and would in fact comply with that duty. Gov't Resp. to Mot. to Compel Disclosure of Exculp. Evid. at 1. On July 22, 1988, respondent filed his Certification of Dispute Over Disclosure of Exculpatory Evidence.

On September 13, 1988, a hearing was held before the district court on the issue of the government's lack of disclosure of exculpatory evidence. The decision in *United States v. Page*, 808 F. 2d 723 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987), was specifically cited to the district court by respondent and the United States Attorney indicated that he was not familiar with the *Page* case or its holding. September 13 hearing transcript, at 11. At the September 13 hearing, the United States Attorney presented the district court with an order which provided, in part, as follows:

> The government may disclose any and all testimony and evidence presented to the Grand Jury for the Northern District of Oklahoma which would be exculpatory in nature and fall within the mandates of *Brady v. Maryland*, 373 U.S. 83 (1963).

J.A. 52. The proposed order further provided that the government was permitted to disclose to respondent "edited" portions of the grand jury testimony while delivering to the court the complete transcript under seal. The district court entered the order, as presented, noting respondent's objection and his request for disclosure of the entire grand jury transcript. September 13 hearing

transcript, at 27. The United States Attorney further advised the district court at the September 13, 1988, hearing that the government would submit to respondent by September 16 all exculpatory materials and that submission was to include the "edited" grand jury transcript. J.A. 52-53.

On September 16, 1988, the government delivered to respondent's counsel excerpts from thirteen (13) FBI interview forms 302, a Credit Memorandum from Village South National Bank (one of the alleged victim banks), and twenty-six (26) pages of excerpted grand jury testimony from four (4) witnesses. Following receipt of the government's September 16 submission, a letter was written to the district court by respondent's counsel, which included the "exculpatory materials" for *in camera* review by the court. Add. ex. E. Respondent's letter to the court was delivered during the pendency of the court's review of the edited and unedited grand jury transcripts. The purpose of the letter was to apprise the court that, given the nature of the government's September 16, 1988, submission of exculpatory materials, disclosure of the entire transcript should be made to respondent's counsel. Respondent referred the court to the fact that many of the excerpts provided by the government were incomplete and contextually ambiguous. Moreover, there was no indication that eleven (11) of the thirteen (13) witnesses which provided exculpatory information to the government, as reflected by the 302s, testified before the grand jury. On September 23, 1988, the United States Attorney delivered a letter to the district court in response to respondent's letter of September 20. *Id.* ex. F. In that letter, the Assistant United States Attorney acknowledged

the government's obligation under *Page*, and represented to the trial judge that the government "went beyond" that obligation. *Id.* at 2. Accordingly, the government's attorney recommended that disclosure of the entire grand jury transcript was "neither necessary nor appropriate." *Id.*

On October 3, 1988, respondent moved to dismiss the indictment on the grounds that the prosecutor failed to disclose substantial exculpatory evidence to the grand jury. The motion was supported by a brief and three (3) volumes of evidentiary materials. The evidentiary material included respondent's deposition taken in the bankruptcy proceeding and the various documents and materials which the government had delivered in connection with its *Brady* obligations.

On October 6, 1988, the government filed a four (4) page response to the dismissal motion. The government's response failed to address any of the exculpatory evidence identified in respondent's papers or the *Brady* submission. The substance of the government's response is noteworthy when contrasted with its positions taken on appeal and in this Court. The government made three (3) arguments in responding to the dismissal motion. First, the government claimed that the dismissal motion should be denied because the "defendant has no right to try his case to the grand jury." Gov't Resp. to Mot. to Dis., Oct. 6, 1988, at 3. Second, the government claimed that it need not produce "any exculpatory evidence, but only that evidence which is substantial evidence negating guilt." *Id.* at 2 (emphasis in original). Third, the government claimed that dismissal "would be inappropriate in this

case, even if the defendant's allegations of improper government conduct before the Grand Jury were true." *Id.* at 4 (emphasis in original).

Respondent had not contended that he had a right to try his case to the grand jury. The government's second and third arguments directly conflict with the dictates of *Page*. The government entirely failed to address respondent's deposition testimony and the fact that, prior to the grand jury proceedings, it had in its possession respondent's general ledgers and tax returns which supported the absolute truth and accuracy of the income statements which the government claimed to be false. In its appeal brief, however, the government changed directions. Instead of ignoring respondent's extensive deposition testimony, or simply dismissing it as "perjurious" or "inculpatory" as it had before the trial court, Gov't Resp. to Mot. to Dis., Oct. 6, 1988, at 4, the government claimed that the testimony was "hearsay and would not be admissible at trial except as a prior consistent statement to rebut any inference of recent fabrication of the defendant's trial testimony." Gov't Br. on App. at 22 (emphasis in original). Yet, in the very same brief the government asserted that *all* of the information which respondent contended the grand jury should have received was actually presented to the grand jury.

On October 14, 1988, the district court entered an order denying the dismissal motion, Pet. App. 16a-18a, and on October 17 respondent filed a motion seeking reconsideration of that order. Trial had been scheduled to commence on October 17. After a jury was selected (but not sworn), the district court heard arguments and considered evidence on various pending motions, including

the motion to reconsider its prior order denying the motion to dismiss. *See* fn. 1, *supra*.

The Factual Underpinnings of the Dismissal Order

Examination of the indictment and the limited information and materials available through discovery indicated that it was the government's theory that certain entries on the documents it claimed to be materially false were overvalued. Respondent denied that any excessive valuation occurred. One of the primary examples of the problem presented by the indictment was respondent's presentation of his notes receivable in the three (3) financial statements which were at issue. J.A. 44, 45 and 46. At most, it seems that the grand jury viewed only limited excerpts from respondent's financial statements or any parts of his financial statements, and those references were not contextually accurate. Respondent's financial statements were prepared since 1975, on at least a semi-annual basis, with the assistance of The Horter Company. This was known to the government. Horter was, and is, a privately owned firm of certified public accountants which prepared financial statements and tax returns for Williams' family members and certain executives of The Williams Companies. Horter devised the form of statements and utilized the format for all of its clients, including respondent. When respondent received a draft of a new statement from Horter, the current balance of each note receivable had already been placed on the draft statement by Horter. Those numbers were accurate. *See* Pet. App. 23a-26a. Respondent then assigned market values to certain other assets (such as securities not traded on a public market). The government never

claimed those values to be false. *See* J.A. 14-23, 24-33 and 34-43.

Horter also maintained respondent's general ledger and compiled balances on each of the promissory notes which respondent designated as "Notes Receivable" on his statements. An examination of those documents supports the accuracy of amounts designated as notes receivable. The government received and reviewed the general ledgers for the applicable years. *See* Add. ex. M.

Every one of respondent's financial statements for the ten (10) year period 1975 through 1985, including the statements identified in the indictment, contained the following legend at the bottom of the first page of each balance sheet:

> * Marketable securities and certain investments have been adjusted to reflect fair market value on [date of statement]. All other assets are reflected at cost or other tax basis.

J.A. 14, 24 and 34. It is apparent from reviewing each balance sheet, in its entirety, that respondent did not attempt to adjust the notes receivable portion of the balance sheet to reflect such assets at "fair market value." Rather, respondent scheduled each note at face value, *i.e.*, the amount of money then due respondent on each promissory note. The government did not dispute those numbers, but merely criticized the manner in which the notes receivable were presented on the balance sheet.

From discussions with the United States Attorney and the FBI, respondent was advised that the government's principal concern with his financial statements involved a listing of notes receivable from Endex, Inc.,

Octave Plateau, and Skyfield Productions, Inc. These entities are closely held venture capital companies. Venture capital companies frequently have negative capital for several years, do not make interest payments in a timely fashion, and require substantial capital infusion. Such investments can, however, be lucrative if properly handled and not liquidated if they fail to perform precisely as projected. Respondent had previously invested over $500,000.00 in the Lexel Corporation, another venture capital company, and guaranteed substantial Lexel bank debt between 1973 and 1978. Lexel had negative capital for several years and could not pay interest in accordance with the terms of its note. In 1983, respondent sold his investment in Lexel for over $4,500,000.00. Pet. App. 25a. The experience with Lexel, which was detailed in the papers and depositions turned over to the government in connection with the Chapter 11 proceedings, supported respondent's continuing belief that Endex, Octave Plateau, and Skyfield could become successful and the notes repaid within a reasonable period of time. That evidence, all of which was in the government's possession, apparently was not presented to the grand jury.

Moreover, historical financial information regarding a venture capital company is not an accurate measure of that company's potential or ability to repay debt. That is what respondent believed then, and the government was in possession of evidence reflecting that belief. Respondent's views with regard to his venture capital investments were expressed in detail in his deposition testimony. The government had that testimony but did not use it. Nor did the government call respondent as a

witness so that the grand jury could have the benefit of his views. Pet. App. 24a.

During 1983 through 1985, respondent made loans on a regular basis to Endex, Skyfield, and Octave Plateau. In fact, the actual advances to these companies during that period of time were hundreds of thousands of dollars. This information is included not only in the deposition testimony of respondent, but in the general ledgers subpoenaed by the government. Add. ex. M. The government contended that respondent knew that the notes from these companies were substantially over-valued or worthless. However, evidence in the government's possession regarding respondent's loans to the venture capital companies is exculpatory on the issue of intent. Respondent had abiding faith in the future of those companies, and supported that belief in 1983, 1984 and 1985 (as he did prior to that time) by continuing to advance funds for operations. Appendices II and III, filed Oct. 3, 1988.

The government had access to and possession of a substantial amount of information. Yet, only a select fraction of the available documents, sworn testimony, and other information was presented to the grand jury. The government apparently did not show the grand jury respondent's complete financial statements for any meaningful period of time. Those statements are exculpatory inasmuch as they reflect a consistent, detailed, and lawful pattern of financial reporting by respondent. Pet. App. 9a. The government had information regarding the procedures employed by respondent and Horter to compile the statements but did not present that information to the grand jury. Respondent followed a method of reporting

his financial condition which was devised by a reputable accounting firm. The format utilized to present respondent's financial statement was absolutely consistent for over ten (10) years and was identical to the format used by Horter in the preparation of financial statements for all other clients. Respondent's financial statements were prepared by Horter with respondent's assistance prior to their dissemination on at least a semi-annual basis. Neither the CPAs nor respondent believed that notes receivable should be reported other than at face value. Respondent's figures were, in all instances, accurate. Any other valuation would have been speculation. The government was aware of all this, but elected not to present it to the grand jury. Pet. App. 25a.

The trial and appellate courts' conclusions that the grand jury was not furnished with substantial exculpatory evidence and was misled are supported by, among other things, the fact that the government claims that respondent's statements of income and expense during the period 1983 and 1984 were materially false. Indictment Counts II, III, V, VI and VII. If the government had presented to the grand jury information within its possession, it would have been clear to the grand jury that respondent's inclusion of interest income on those statements was completely accurate and consistent with the general ledgers maintained by Horter, respondent's federal income tax returns, and respondent's bank statements. Respondent reported interest and paid tax on that interest. Likewise, if the government had presented to the grand jury the general ledgers, or relevant excerpts from the general ledgers, the grand jury would have been able

to determine that respondent, with the assistance of Horter, accurately presented the note balances which comprise the "Notes Receivable" portion of the financial statements. If the government had presented the general ledgers to the grand jury, or relevant excerpts from the general ledgers, the grand jury would have determined that respondent loaned substantial amounts of money to the venture capital companies in 1984 and 1985, therefore evidencing a belief that the companies had intrinsic value and could repay the notes.

The Government's Explanation

In its brief before this Court, petitioner cites its response brief to respondent's motion to dismiss and claims that it "introduced the relevant financial records and account documents pertaining to the charged offenses, and that it called witnesses before the grand jury who had testified about respondent's confidence in his venture capital investments." Pet. Br. at 4. The government in fact took a host of positions as to why it did not submit the exculpatory material to the grand jury. In the trial court, the government excused its conduct by labeling the subject evidence "perjurious" and "inculpatory." Before the court of appeals, the government sought to excuse its conduct by an examination of the "relevance" or the "admissibility" of the exculpatory materials. The government prefaced the argument portion of its appeal brief with the statement that it "will discuss the relevance and admissibility of the [exculpatory] items in two sections: (1) the tax returns, general ledgers and financial statements; and (2) the defendant's deposition

testimony." Gov't Br. on App. at 14. The appeal brief continued, "[t]he government contends that the defendant's tax returns, general ledgers, and financial statements were in fact presented to the Grand Jury insofar as they were relevant." *Id.* at 15.

As to respondent's deposition testimony, the government admitted in its appeal brief that the deposition transcripts were not made available to the grand jury. The government attempted to justify that fact by characterizing respondent's detailed testimony as "hearsay" and "self-serving," and claiming that "all of the information the defendant contends the Grand Jury should have received from his civil deposition was conveyed to the Grand Jury by other witnesses." *Id.* at 22, 23, 30, 35 and 41. It is curious that this information would have been presented to the grand jury by the government if it so vehemently believed that it was inadmissible, irrelevant, perjurious and hearsay, among other things. The government's investigation itself belies its claim of the "irrelevance" of respondent's deposition testimony. It was the government that gathered all of this exculpatory evidence while conducting its investigation in this case. Moreover, on October 14, 1988, three (3) days before trial was to commence, the government submitted its proposed stipulations to respondent seeking the admission of each of the five (5) volumes of respondent's deposition transcript. Add. ex. N. These proposed government stipulations in part stated that the parties agreed that the deposition transcripts were "admissible at trial in the above-styled matter . . . . " *Id.*

For whatever reason, the grand jury was deprived of evidence, clearly known to the government at the time of

the grand jury investigation, which bore directly upon respondent's knowledge and intent to support the subject criminal charges. Review by the prosecutor of respondent's tax returns would have revealed the source of the information on the income statements. But the applicable portions of the returns were neither presented nor explained to the grand jury. A review of respondent's financial statements from 1975 would have revealed a systematic and consistent quarterly reporting of the information which the government claimed was inaccurate in 1984. A review of portions of the deposition transcript would have revealed the testimony of respondent explaining the accuracy of the financial statements identified in the indictment.

The government's papers in the court of appeals, unlike its positions taken in the trial court and in this Court, claimed that the substantial exculpatory evidence withheld was irrelevant under its "theory of the case." Apparently, the government's justification for failing to present overwhelming evidence negating respondent's guilt was premised entirely upon its view of relevance.[4]

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[4] The volume of the exculpatory evidence in the possession of the prosecution in this case should not serve as a basis for the prosecution justifying non-disclosure of that evidence to the grand jury. The government could have disclosed this evidence by a number of methods. For example, the case agent was David Brechwald, an agent with the Federal Bureau of Investigation, who is a certified public accountant. Brechwald could have reviewed and analyzed a great deal of the subject material and presented it in summary form to the grand jury.

Tying its "theory of the case" to its subjective view of relevance, the government reasoned that it would have "been a waste of time" and a "fruitless gesture" to present exculpatory evidence to the grand jury because it would not have understood that evidence:

> The grand jury would not have known or understood the relevance of those documents without knowing the defendant's theory of the case, so the presentation of those documents would have been a fruitless gesture. Had the government used a witness to discuss all those documents, line by line, it would have taken forever and been a waste of time, as the grand jury still would not have known or understood how those documents fit into the case, without knowing the defendant's theory of the case.

Gov't Resp. Br. on App. at 7. Though this reasoning provides an expedient means by which the government may attain its goals, it is legally unsupportable.[5] Because virtually all the evidence at issue related to a lack of

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[5] It is not possible for respondent to address fully petitioner's inconsistent arguments relating to whether or not it presented substantial exculpatory evidence in its possession to the grand jury. The trial and appellate courts denied respondent's motions seeking the disclosure of additional grand jury testimony. Thus, respondent has never had access to the entire grand jury transcript in order to address comprehensively issues presented, and respond to claims and arguments made by the government. The government, the trial court, and the court of appeals had, and this Court has, the benefit of the entire grand jury transcript. Clearly, the trial and appellate courts did not agree with petitioner's assertion that the exculpatory evidence at issue was, in some form, presented to the grand jury.

(Continued on following page)

requisite intent to commit the crime which was the subject of the grand jury's investigation, the exculpatory nature of this evidence would apply regardless what theory of defense might have been adopted. It is also directly contrary to representations made by the prosecution to the district court. In a letter dated September 23, 1988, which accompanied the grand jury transcripts being submitted to the court for *in camera* review, the United States Attorney stated "the government believes that rather than requiring that all possibly exculpatory evidence be produced for the Grand Jury, the Page case only requires that substantially exculpatory evidence be produced. As the Court can see from the complete

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In its appeal papers, the government claimed that grand jury testimony dealt with areas of evidence which were found to be exculpatory and not presented to the grand jury. The government declined to quote such alleged portions of the grand jury transcript, however, claiming that to do so "would further play into the defendant's hand [sic] and give him more of what he is not entitled to." Gov't Resp. Br. on App. at 9. The government then stated that it "has complete faith in the Court's assessment of the grand jury testimony and would expect the defendant to have the same." *Id.* The faith which petitioner asked respondent to have in the court of appeals' assessment of the grand jury testimony (as opposed to respondent's participation in the process by informed review, and assessment of whatever was, or was not, presented to the grand jury) is similar to petitioner's claim that prosecutors would not seek indictments where the chances of conviction are remote and the suggestion that this provides an adequate check on prosecutorial misconduct. If this were the case, there would have been no need for inclusion of the grand jury clause in the Fifth Amendment.

transcripts, the government went beyond that requirement . . . . " App. I, ex. N, Oct. 3, 1988 (emphasis in original). This was not true.

Regardless of theories of defense or prosecution, an essential element of a section 1014 violation requires that the government establish that the defendant made the false statements knowingly. The trial court concluded that the substantial exculpatory evidence which the prosecutors had in their possession but elected not to present to the grand jury related directly to "the issue of Defendant's intent to make materially false statements upon which the banks would rely." Pet. App. 24a. This is true under any theory.

SUMMARY OF ARGUMENT

A. Though the grand jury's function is investigative, its mission is also to clear the innocent no less than it is to bring those who may be guilty to trial. It serves as a check on the power of government and thereby protects citizens against arbitrary and oppressive governmental action. The grand jury must therefore be both independent and informed. If a grand jury does not have access to all relevant evidence, its judgment cannot be truly informed. When the government usurps the grand jury's function by withholding from it substantial exculpatory evidence negating an essential element of the offense charged, the grand jury's independence is compromised. As this Court has frequently recognized, a grand jury cannot fulfill its function unless it is afforded the opportunity to inquire into all relevant information to find if a crime may have been committed.

The burdens which petitioner claims would flow from the imposition of a duty on the prosecutor to disclose substantial exculpatory evidence negating guilt to the grand jury are overstated. The Department of Justice, a number of federal courts, and approximately one-fourth of the states have, for a number of years, imposed such a duty on prosecutors. No adverse impact has flowed from this practice; but certainly targets of grand juries have justly been freed because the grand jury was informed of substantial exculpatory evidence negating guilt. Moreover, the government in this case never claimed that this duty was burdensome. It repeatedly claimed that it complied with its duty, and even *went beyond* the requirements of *Page*.

B. The government contends that the "rule" established by the Tenth Circuit is that prosecutors are required to present exculpatory evidence to grand juries. No such "rule" has been established in the Tenth Circuit either in this case or in any other case. Moreover, no such "rule" has been announced by any of the circuit courts of appeals. Here, the prosecutor was knowingly in possession of *substantial* exculpatory evidence negating a fundamental element of the offense charged. No circuit has held that, under such circumstances, the prosecutor is not bound to present that evidence to the grand jury. Regardless of theories of defense or prosecution, the prosecutor must be aware of the essential elements of the crimes for which he is seeking an indictment. Violations of 18 U.S.C. § 1014 include as elements (i) that the statements made to the bank were false as to material facts, and (ii) that the defendant made the false statements knowingly. *See, e.g., United States v. Smith*, 838 F.2d 436, 439 (10th Cir. 1988).

Where prosecutors have in their possession, but elect not to present to the grand jury, substantial exculpatory evidence which relates directly to the target's intent to make materially false statements, that evidence must be presented to the grand jury. This is true regardless of what theory of defense may exist, or may ultimately be adopted by a defendant.

C. The court of appeals' affirmance of the dismissal of the indictment was proper. A district court may invoke its supervisory power to dismiss an indictment for prosecutorial misconduct in the grand jury proceedings where that conduct prejudices a defendant. Upon an analysis of the withheld evidence, a thorough review of the grand jury transcript, and following an evidentiary hearing, the trial court concluded that "the government had in its possession substantial exculpatory information that would have assisted the grand jury in fairly evaluating intent within the context of all the relevant evidence. . . . The absence of this substantial exculpatory evidence on perhaps the most crucial element of the crime charged renders the grand jury's decision to indict gravely suspect." Pet. App. 26a.

The prosecutors were aware of the substance of the evidence in their possession which was withheld from the grand jury. The government had obtained the specific evidence as a part of its investigation; it was not provided to the government by respondent's counsel. At the court of appeals, the government attempted to justify its withholding of this evidence based on the claim that it was inconsistent with its "theory of the case," and stated that it would have "been a waste of time" and a "fruitless gesture" to present evidence negating an element of the

offense to the grand jury because it "would not have known or understood the relevance of those documents without knowing the defendant's theory of the case . . . . " Gov't Resp. Br. on App. at 7. Exculpatory evidence would never fit within a prosecutor's "theory" of a case. The finding of intent to commit a criminal act is a determination the grand jury must make in deciding whether probable cause exists. Absent this substantial and relevant exculpatory evidence on a crucial element of the crime charged, the grand jury's decision to indict was gravely suspect and dismissal was thus appropriate.

ARGUMENT

A. The Grand Jury Performs the Dual Functions of Determining Whether There is Probable Cause and Protecting Citizens From Government Overreaching – The Presentation of Substantial Evidence Negating Guilt is Fully Consistent With These Functions and Imposes no Significant Burden on the Courts or the Government.

Petitioner devotes a significant portion of its brief to the functions of the grand jury. It claims that the requirement that prosecutors present exculpatory evidence to the grand jury is incompatible with these functions, and that imposition of such a requirement would result in virtually overwhelming burdens being imposed upon the courts and prosecutors. Pet. Br. at (I), 9, 10, 16 n. 4 and 17.[6] Petitioner

[6] Petitioner repeatedly claims that the "rule" established in *United States v. Page*, 808 F.2d 723 (10th Cir.), *cert. denied*, 482

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has apparently overlooked the fundamental principles that the grand jury not only determine whether there is probable cause, but also that it free the innocent and protect citizens from government overreaching.

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . . " This constitutional guarantee derives from the traditional English institution of the grand jury which English settlers brought to the American colonies. *See Costello v. United States*, 350 U.S. 359, 362 (1956). Originally used to aid the Crown in detecting and prosecuting crimes, the English grand jury came to be perceived as a shield for the accused against baseless accusations. 1 S. Beale & W. Bryson, *Grand Jury Law & Practice*, § 1:03, p. 12 (1986). The function of the grand jury ultimately became:

> [t]o preserve the innocent from the Disgrace and Hazzards which Ill men may design to bring

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U.S. 918 (1987), and followed by the trial and appellate courts in this case, is that the government must present exculpatory evidence to the grand jury. This is an incomplete, inaccurate, and misleading characterization of the duty which has been recognized by a number of courts, the Tenth Circuit among them. No court has held that a prosecutor has the duty to present merely exculpatory evidence to a grand jury. *See* part B, *infra*. In all instances, courts require that the prosecutor know of or possess the exculpatory evidence as a result of his investigation, and that the evidence be substantial exculpatory evidence. The court of appeals specifically recognized that the prosecutor is not required to "ferret out and present every bit of potentially exculpatory evidence . . . . " Pet. App. 5a, citing *Page*, 808 F.2d at 728. Moreover, dismissal is not appropriate unless the withheld exculpatory evidence is so substantial that it negates the target's guilt or renders the grand jury's decision to indict gravely suspect.

> them to, out of Malice, or through Subordination or other Sinister Ends; for so tender is the Law, of the Reputation and Life of a Man, that it will not suffer the one to be sullied . . . and the other endangers by a Trial, until first the Matter and Evidence against him have been scann'd, examined, and found by a Grand Jury, upon their Oaths, against him.

Id. at 9, *quoting* H. Care, English Liberties Of The Free-Born Subject's Inheritance, 252 (4th ed. 1719).

Against this background, the framers incorporated the requirement of indictment by grand jury into the Bill of Rights. Since then, this Court has recognized the dual functions of the grand jury. The grand jury serves "as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity." *Stirone v. United States*, 361 U.S. 212, 218 n.3 (1960). In *Wood v. Georgia*, 370 U.S. 375 (1962), the Court held that the grand jury has historically functioned "as a primary security to the innocent against hasty, malicious and oppressive persecution" serving "the invaluable function in our society of standing between the accuser and accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Id.* at 390. The grand jury's function of standing "between the accuser and the accused" has been referred to as "the most valuable function of the grand jury . . . ." *Hale v. Henkel*, 201 U.S. 43, 59 (1906); *Hoffman v. United States*, 341 U.S. 479, 485 (1951). "The very purpose of the requirement that a man be indicted by a grand jury is to

limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone*, 361 U.S. at 218. *See also Costello*, 350 U.S. at 362.

The mission of the grand jury "is to clear the innocent, no less than to bring to trial those who may be guilty." *United States v. Dionisio*, 410 U.S. 1, 16-17 (1973). The grand jury serves as a check on the power of the government and is thereby "a protector of citizens against arbitrary and oppressive governmental action." *United States v. Calandra*, 414 U.S. 338, 343 (1974). The grand jury must therefore be both "independent and informed." *Wood v. Georgia, supra*, 370 U.S. at 390. "To be independent and informed, the grand jury must be able to obtain all relevant evidence, since only then can its judgment truly be informed." *United States v. Flomenhoft*, 714 F.2d 708, 711 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984). In *United States v. R. Enterprises, Inc.*, 111 S. Ct. 722 (1991), the Court recently summarized the function of the grand jury as follows:

> The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' "

Id. at 726 (*quoting Branzburg v. Hayes*, 408 U.S. 665, 701 (1972)).

Though prosecutors have wide latitude in evidentiary presentations made to grand juries, *see United States v. Mechanik*, 475 U.S. 66, 84 (1986) (O'Connor, J., concurring), they do not have unfettered discretion. Rule 6 of the Federal Rules of Criminal Procedure and the courts' supervisory powers guide prosecutors and prevent them from infringing upon a grand jury's independence and from presenting evidence to a grand jury in deliberately misleading ways. *Mechanik*, 475 U.S. at 74-75; *United States v. Udziela*, 671 F.2d 995, 998-99 (7th Cir.), *cert. denied*, 457 U.S. 1135 (1982) (collecting cases where indictment dismissed). Thus, a prosecutor may not manipulate the process to ensure that all witnesses testify in a consistent manner. *Mechanik*, 475 U.S. at 74. Likewise, the prosecutor may not manipulate a witness' testimony or knowingly participate in a misleading and inaccurate grand jury presentation. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 260-61, 262 (1988).

The rule that a prosecutor has the duty to reveal to the grand jury substantial exculpatory evidence discovered during the course of an investigation is consistent with, and furthers, these principles. Though the grand jury is vested with broad investigatory authority, in reality it relies almost exclusively upon the evidence presented by the prosecutor. "Although the grand jury may itself decide to investigate a matter or to seek certain evidence, it depends largely on the prosecutor's office to secure the evidence or witnesses it requires." *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 430 (1983). Certainly the grand jury could not be truly independent

and informed if the prosecutor were allowed to conceal substantial exculpatory evidence, thus leaving the grand jury with a false impression rather than an informed one. As counsel for petitioner succinctly stated before authoring the certiorari papers in this case, "[c]oncern has been expressed that the prosecutor exercises too much control over the modern grand jury, which may become nothing more than a rubber stamp. Requiring the prosecutor to inform the grand jury of evidence that may exonerate the accused strengthens the grand jury's ability to screen out weak cases." 1 S. Beale & W. Bryson, *Grand Jury Law & Practice*, § 6:03, p. 13 (1986).

The grand jury's independence is compromised if, by the prosecutor's manipulation, it merely functions as an arm of the prosecution. The grand jury must be apprised of all relevant evidence not only so that its judgment may be truly informed, but in order to facilitate its ability to inquire pursuant to its investigatory function. Requiring the prosecutor to disclose substantial evidence in his or her possession which is exculpatory in nature does not "invite the grand jury to move from its limited screening role to the broader role reserved for the petit jury," as petitioner contends. Pet. Br. at 18. Imposing a duty on the prosecutor to present such evidence to the grand jury allows the grand jury to perform its screening role. Absent the disclosure of such evidence, the grand jury is not in fact screening instances where probable cause exists from those where it does not, but is instead making this determination based upon an incomplete and misleading examination of evidence.

Petitioner's claim that presentation of substantial exculpatory evidence to the grand jury is unduly

burdensome and outweighed by any benefits is contrary to the facts. For many years, district and circuit courts have required prosecutors who are aware of substantial exculpatory evidence negating guilt to present that evidence to the grand jury. Yet, the "system" which petitioner seeks to protect has not grounded to a halt or evidenced negative side effects of any type throughout this period.[7] To the contrary, courts have efficiently and effectively enforced violations of the prosecutor's duty to present substantial exculpatory evidence to the grand jury and have dismissed indictments in appropriate cases. *E.g., United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974); *United States v. Isgro*, 751 F. Supp. 846 (C.D. Cal. 1990); *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979); *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977); *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977); *United States v. DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975), *aff'd on other grounds*, 550 F. 2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977). Moreover, approximately one-fourth of the states

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[7] Since the court of appeals' decision in this case, the Tenth Circuit affirmed a trial court's denial of a dismissal motion premised upon a defendant's claim that substantial exculpatory evidence was withheld from the grand jury. *United States v. Reid*, 911 F.2d 1456, 1459-60 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 990 (1991). The court of appeals expressly recognized that evidence which could fairly be characterized as "exculpatory" was withheld from the grand jury, but concluded that the defendant could not "meet the difficult burden of showing that the government's failure to disclose [the witness'] complete criminal history had any affect on the grand jury's decision to indict." *Id.* at 1460.

have recognized that in appropriate circumstances the prosecutor has a duty to inform the grand jury of exculpatory evidence. 1 S. Beale & W. Bryson, *Grand Jury Law & Practice*, § 10:09, p. 38 (1986). This obligation is recognized in the American Bar Association's Standards for Criminal Justice, which state that "[n]o prosecutor should knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt." *American Bar Association Standards For Criminal Justice*, § 3-3.6(b) (1980).

The Department of Justice itself has long required that "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor *must present* or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." United States Attorneys' Manual ¶ 9-11.233, at 18 (1990) (emphasis added). It is difficult to accept petitioner's present concerns about the "costs to the system" which would flow from the imposition of a duty on prosecutors such as that recognized in the Tenth Circuit when the Department of Justice itself imposes such a duty on its attorneys. The very practice which petitioner claims will result in improper mini-trials invasive of the grand jury's function is, and has been, followed by the government without adverse impact on the criminal justice system or notable expression of any difficulty in interpreting or applying this rule.

The petitioner's conduct in the instant case belies its claims that the court of appeals' rule is "sweeping, burdensome, and intrusive" and that "[t]he marginal benefits, if any, that would flow from that regime would come

at far too high a cost." Pet. Br. at 28 and 25, respectively. Petitioner never raised the issue presented to this Court in the trial or appellate courts. Petitioner never contended that the duty of a prosecutor, first recognized in the Tenth Circuit in *Page*, was unduly burdensome or violative of any grand jury functions or constitutional principles. Indeed, in the district court and on appeal, petitioner unequivocally embraced the very principles which it now asks this Court to review and reject. Petitioner consistently asserted that it had fully complied with its obligations under controlling authorities of the Tenth Circuit and this Court by supplying exculpatory evidence to the grand jury. For example, in an appeal brief petitioner stated:

> The government has acknowledged that it has certain responsibilities under the case of United States v. Page, 808 F.2d 723 (10th Cir. 1987), and that [sic] includes a duty to not withhold substantial exculpatory evidence from a grand jury if such exists . . . . The government would contend that although it may not have been familiar with the Page case by name, it was familiar with and complied with the principles stated in the case.

Gov't Resp. Br. on App. at 9-10.[8]

Petitioner's position throughout this litigation is that it has complied with its duty to disclose substantial evidence which directly negates the guilt of a subject of the

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[8] Perhaps petitioner's purported familiarity and compliance with the principles enunciated in *Page* was based upon its familiarity with its obligations as set forth in the United States Attorneys' Manual.

investigation. On one occasion petitioner advised the trial court that it "went beyond that requirement." The government never took issue with its obligation or with the holding in *Page*, but instead challenged whether the evidence was substantial or exculpatory.

> The government contends that Page, supra, requires the government to present to the grand jury evidence which is clearly substantially exculpatory. The government has shown that the evidence which the defendant argues is exculpatory is neither substantial nor clearly exculpatory; thus, the government did not err in failing to present it to the grand jury, and the trial court did err in dismissing the indictment.

Gov't Resp. Br. on App. at 11. And in its Brief in Chief to the Tenth Circuit, petitioner hastened to add that the court should follow its prior decision, stating "[t]he government would assert that this Court should follow the holding of Page . . . . " Gov't Br. on App. at 43. It was in the Petition for Certiorari that petitioner first challenged the rule, and devised the various administrative and practical burdens which compliance with the rule allegedly imposes.

B. The Substantial Nature of the Exculpatory Evidence Distinguishes This Case From Decisions Rendered by Other Circuits.

No Circuit Court of Appeals has ever held that the failure to present merely exculpatory evidence to a grand

jury requires dismissal of an indictment under the exercise of the court's supervisory power. The government cites three decisions which it contends "have squarely rejected any rule that the prosecutor must present exculpatory evidence to a grand jury." Pet. Br. at 19 n. 6.[9] Neither the Tenth Circuit, nor any other court, has adopted such a rule. The court of appeals' decision here was based upon the government's breach of its duty to present to the grand jury *substantial* exculpatory evidence obtained by the prosecution in the course of its investigation. That rule was first announced in the Tenth Circuit in *United States v. Page*, 808 F.2d 723 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987). The *Page* court stated:

> [A]lthough a prosecutor need not present all conceivably exculpatory evidence to the grand jury, it must present evidence that clearly negates guilt. . . . Under this standard the prosecutor is not obliged to ferret out and present every bit of potentially exculpatory evidence. But when *substantial* exculpatory evidence is discovered in the course of an investigation, it must be revealed to the grand jury. This promotes judicial economy. If a fully informed grand jury cannot find probable cause to indict, there is little chance the prosecution could have proved guilt beyond a reasonable doubt to a fully informed petit jury.

Id. at 727-28 (citations omitted) (emphasis in original). There is a distinction between the government's obligation when it is in possession of merely "exculpatory" evidence and its duty to disclose *substantial* exculpatory evidence negating guilt. Neither petitioner's argument nor its authorities address this material distinction.[10]

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[9] The Government cites *United States v. Larrazolo*, 869 F.2d 1354 (9th Cir. 1989); *United States v. Hawkins*, 765 F.2d 1482 (11th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986); and *United States v. Adamo*, 742 F.2d 927 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985). None of these cases, however, involved the government's failure to provide *substantial* exculpatory evidence to a grand jury. Nor did these cases involve conduct which rendered the grand jury proceedings fundamentally unfair or infringed upon the exercise of the grand jury's independent judgment.

[10] The only reference in petitioner's brief to "substantial" in connection with the Tenth Circuit's rule, found at pages 9 and 26 of its brief, is the claim that the "costs" of the rule would not be reduced by defining the prosecutor's duty "as applying only to 'substantial' exculpatory evidence." *Id.* at 26. Petitioner claims that "such a standard would be extremely difficult for prosecutors to follow or courts to apply." *Id.* at 9. Courts and counsel make such determinations virtually every day. Standards are commonly defined by use of the term "substantial." For example, this Court recognized that the prejudice inquiry involved in a determination of whether dismissal is warranted for conduct such as is involved here focuses on whether the conduct "may have influenced *substantially* the grand jury's decision to indict . . . . " *Bank of Nova Scotia*, 487 U.S. at 259 (emphasis added). Appeals of administrative law decisions are considered under a "substantial evidence" standard. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Courts often determine the constitutionality of legislative classifications by analyzing whether the legislation is "substantially related to serve an important governmental interest." *Craig v. Boren*, 429 U.S. 190, 197 (1976). Likewise, disability benefits may be denied should a claimant be engaged in "substantial gainful activity," 20 C.F.R. 404.1575, and a district court will not review a bankruptcy court decision confirming a plan of reorganization if the challenged plan is "substantially consummated." 11 U.S.C. § 1101(2). Additional taxes may be assessed

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In *United States v. Adamo*, 742 F.2d 927 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985), the court did not address the legal effect of the government's knowing refusal to provide the grand jury with *substantial* exculpatory evidence negating guilt. The court considered only the effect of the government's failure to present merely "exculpatory" evidence to the grand jury. The allegedly exculpatory evidence in *Adamo* was not "substantial" because it related to issues of credibility and was subject to different interpretations. In addition, perjured testimony in *Adamo* was discovered to be false after it had been presented to the grand jury.

The government's reliance upon *United States v. Hawkins*, 765 F.2d 1482 (11th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986), is similarly flawed. *Hawkins*, like *Adamo*, is inapposite because it does not address the government's duty when in possession of *substantial* exculpatory evidence. As in *Adamo*, the *Hawkins* court was not called upon to determine the effect of a prosecutor's failure to

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should a taxpayer make a "substantial understatement" of income for a given year. 26 U.S.C. § 6661(b)(1). Attorney conflict of interest rules are resolved based upon a " substantially related" standard. Rule 1.10(b) of the ABA Model Rules of Professional Conduct, adopted in Oklahoma as Oklahoma Rules of Professional Conduct, Rule 1.10(b), Okla. Stat. tit. 5, chapter 1, app. 3-A (1991).

reveal to the grand jury *substantial* exculpatory evidence. In fact, the *Hawkins* court rejected the defendant's arguments that the withheld evidence was in any way exculpatory. The court specifically stated that the defendant's arguments were based on speculation, *id.* at 1488, and concluded that the defendant's "unsupported allegations [were] irrelevant and without merit." *Id.*

The government's reliance on *United States v. Larrazolo*, 869 F.2d 1354 (9th Cir. 1989), is also misplaced. *Larrazolo* does not address the effect of a prosecutor's failure to present *substantial* exculpatory evidence to the grand jury. The evidence in *Larrazolo* may not have been exculpatory at all (let alone substantial exculpatory evidence) because it was subject to different interpretations. Unlike the present case in which prejudice was found to exist, the *Larrazolo* court noted that the defendant had not met the standard of prejudice required by *Bank of Nova Scotia*, *id.* at 1359-60, stating that "[t]he possibility of a negative inference from the evidence shows that defendants might have benefitted from the absence of the evidence." *Id.* at 1360.

The government notes that two circuits have held that, in *normal circumstances*, a federal prosecutor is not required to submit "exculpatory" evidence to the grand jury. Pet. Br. at 19 n. 5. The decisions in those cases, however, are not relevant to the issue presented here. First, this case is not "normal" because the exculpatory evidence in the government's possession was substantially exculpatory on the issue of criminal intent, a necessary element of the government's burden to prove probable cause that respondent may have committed a crime. Second, the evidence in the cases cited by the

government did not involve prosecutorial conduct which tainted the grand jury's charging decision.

In *United States v. Rivera-Santiago*, 872 F.2d 1073 (1st Cir.), *cert. denied*, 492 U.S. 910 (1989), the court affirmed the district court's refusal to dismiss an indictment, stating that "[t]he prosecutor before a grand jury is not *normally* under a duty to disclose exculpatory evidence." *Id.* at 1087 (emphasis added). The *Rivera-Santiago* court's use of the qualifying term "normally" suggests a recognition that extraordinary situations may occur in which the prosecutor is charged with a duty to present exculpatory evidence to the grand jury. Unlike the present case, the record in *Rivera-Santiago* was devoid of evidence that prosecutorial conduct distorted the integrity of the grand jury process. The court's decision in *Rivera-Santiago* is also supported by other circumstances not found in the present case. Specifically, the court noted that the claim of governmental misconduct had never been presented to the district court, that the alleged perjury did not relate to the defendant's indictment but, rather, had been committed in a previous case, and that the defendant's conviction on the charges rendered the error harmless under the *Mechanik* standard. *Id.* at 1088.

In *United States v. Vincent*, 901 F.2d 97 (8th Cir. 1990), the Eighth Circuit recognized that a prosecutor is not obligated to present exculpatory evidence to a grand jury. Unlike the evidence in the present case, however, none of the allegedly excuplatory evidence considered by the *Vincent* court was relevant to, or negated, an element of the crime being investigated (possession of a firearm). In fact, the *Vincent* court found that the element of "possession" had been established by uncontroverted facts. *Id.* at 98 n.

1. Finally, the court's decision was in part based on the fact that the defendant was convicted of the crime, thus rendering any error in the grand jury proceedings "harmless." *Id.* at 99.[11]

The government acknowledges that the Second and Seventh Circuits have recognized that federal prosecutors are charged with a duty to sumbit *substantial* exculpatory evidence to the grand jury. In *United States v. Ciambrone*, 601 F.2d 616 (2d Cir. 1979), the Second Circuit addressed the defendant's contention that the prosecutor failed to reveal to the grand jury that the defendant's perjured testimony at a prior trial was coerced by threats against his life. The court noted the significant fact that the defendant and his attorney had rejected the government's invitation to appear before the grand jury to assert that claim. The court rejected the defendant's arguments because there was nothing in the record to indicate that the government had misrepresented the facts. *Id.* at 624. The Second Circuit expressly stated, however, "that where a prosecutor is aware of any *substantial* evidence negating guilt he should in the interest of justice, make it known to the grand jury, at least *where it might reasonably be expected to lead the jury not to indict.*" *Id.* at 623

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[11] The government's brief makes no reference to the Eighth Circuit's prior decision in *United States v. Civella*, 666 F.2d 1122 (8th Cir. 1981), where the court recognized the distinction between normal and extraordinary instances of government conduct in connection with its duty to disclose evidence to the grand jury. In *Civella*, the court stated that "[t]he prosecutor is *normally* not under a duty to disclose facts which would be the basis of a *defense* at trial." *Id.* at 1127 (emphasis added).

(emphasis added). The Second Circuit stated that "the prosecutor's right to exercise some discretion in the presentation of evidence to a grand jury does not entitle him to mislead it or to engage in fundamentally unfair tactics before it." *Id.*

In *United States v. Flomenhoft*, 714 F.2d 708 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984), the court recognized the distinction between normal circumstances involving merely exculpatory evidence and extraordinary instances of conduct involving the concealment of *substantial* exculpatory evidence. The court stated:

> This Court's careful scrutiny of the alleged "exculpatory evidence," which the government failed to present to the first grand jury, causes us to echo the sentiments of [the trial judge] who noted " . . . there is a big difference between exculpatory evidence and evidence that may be impeaching in some important or unimportant respect." . . . Nonetheless, even assuming arguendo that this exculpatory evidence meets the clearly exculpatory standard enunciated in *United States v. Dorfman*, 532 F. Supp. 1118, 1133 (N.D. Ill. 1981) (" . . . while prosecutors need not present to the grand jury all circumstances which might be considered exculpatory, they must present evidence which clearly negates the target's guilt."), this is not a case where the government failed to present the exculpatory evidence to the grand jury.

Id. at 712 (citation omitted).[12]

In *United States v. Wilson*, 798 F.2d 509 (1st Cir. 1986), the court specifically recognized an exception to the general rule relied upon by the government and stated "that an obligation to disclose 'should' exist where the prosecutor is aware of substantial evidence negating guilt . . . . " *Id.* at 517 n. 2. Recognition of such an obligation resulted in the dismissal of an indictment in *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979). In *Gold*, the court stated:

> When a prosecutor refuses to present exculpatory evidence, he, in effect, destroys the existence of an independent and informed grand jury. As this court has already said, the constitutional guarantee that no person shall be held to answer for a capital or otherwise infamous crime, unless on the presentment or indictment of a grand jury, presupposes an investigative body acting independently of either the prosecuting attorney or the judge.

Id. at 1353.

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[12] In *Matter of the Special April 1977 Grand Jury*, 587 F.2d 889 (7th Cir. 1978), the Seventh Circuit had previously recognized the government's duty to present *substantial* exculpatory evidence to the grand jury. The duty was recognized in relation to the express terms of the United States Attorney's Manual, which mandates disclosure of such evidence. The court affirmed the denial of a dismissal motion, finding that the alleged exculpatory evidence was not substantial. *Id.* at 893.

The duty first recognized by the Tenth Circuit in *Page* and applied here, was well expressed in *United States v. Dorfman*, 532 F. Supp. 1118 (N.D. Ill. 1981):

> Failing to present evidence which exculpates the target to the grand jury clearly violates this constitutional duty of the prosecutor to remain fair, and ensure that "justice shall be done."
>
> * * *
>
> Giving prosecutors untrammelled freedom to pick and choose which evidence they will present to a grand jury would make a mockery of their constitutional duty of fairness, and render the grand jury meaningless as a check on prosecutorial abuse. Prosecutors should not be permitted to mislead the grand jury through selective presentation of evidence.
>
> * * *
>
> Accordingly, while prosecutors need not present to the grand jury all circumstances which might be considered exculpatory, they must present evidence which clearly negates the target's guilt.

Id. at 1132-33 (citations omitted).

In *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974), the Ninth Circuit held that an indictment, based partially on perjured testimony, should have been dismissed. The court noted that, because the prosecutor wields great power and authority over the grand jury process, *id.* at 785, "there is a correlative duty . . . not to permit a person to stand trial when he knows that perjury permeates the indictment." *Id.* The court stated:

> Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a

> *duty* to immediately inform the court and opposing counsel – and if the perjury may be material, also the grand jury – in order that appropriate action may be taken.

Id. at 785-86 (emphasis added). The court based its decision "on a long line of cases which recognize the existence of a duty of good faith on the part of the prosecutor with respect to the court, the grand jury, and the defendant." *Id.* at 786.

In *United States v. Recognition Equipment Inc.*, 711 F. Supp. 1 (D.D.C. 1989), the court recognized that the government is under an express duty to submit substantial exculpatory evidence to the grand jury. In denying the defendant's motion for production of the grand jury transcript based on alleged irregularities in those proceedings, the court stated:

> [I]t is appropriate that an indictment may be dismissed only when the prosecutor's misconduct has "substantially influenced the grand jury's decision to indict, or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." . . . *This is not to say that the prosecution may hide evidence that clearly negates guilt from the grand jury – it may not* . . . . However, an indictment may be dismissed only when the misconduct has clearly infringed on the grand jury's ability to evaluate whether the evidence establishes probable cause.

Id. at 12 (emphasis added) (citations omitted). The government should present substantial evidence to the grand

jury "if it is of such quality that the prosecutor has good reason to believe it could lead the jury not to indict." *United States v. North*, 708 F. Supp. 370, 371 (D.D.C. 1988).

Petitioner sought certiorari claiming that the question presented was "[w]hether an indictment may be dismissed because the government failed to present exculpatory evidence to the grand jury." This is how petitioner has framed the question presented in its brief as well. Consistent with this mischaracterization of the holding of the court of appeals, petitioner has consistently referred to the "rule" at issue as being one "that mandates the disclosure of exculpatory evidence to the grand jury . . . ." Pet. Br. at 17. No such rule exists in the Tenth Circuit. Nor does any such rule exist in any of the courts of appeals. Petitioner's conflict among the circuits is illusory. Virtually all the courts of appeals have held that prosecutors are not generally required to present exculpatory evidence to the grand jury. The three courts of appeals which petitioner relies upon as having rejected a rule such as that imposed here by the Tenth Circuit were not considering cases in which the prosecutor concealed *substantial* exculpatory evidence negating guilt. The decisions cited by petitioner as conflicting with the rule announced in the Tenth Circuit (*United States v. Larrazolo*, 869 F.2d 1354 (9th Cir. 1989); *United States v. Hawkins*, 765 F.2d 1482 (11th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986), and *United States v. Adamo*, 742 F.2d 927 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985)) do not conflict with that rule. Those cases simply did not address situations such as that presented here where a prosecutor is aware of substantial exculpatory evidence negating guilt

but fails to present it to the grand jury, thus rendering the grand jury's decision to indict gravely suspect.[13]

C. The Tenth Circuit's Standard Requiring Prosecutors to Present Substantial Exculpatory Evidence Which Clearly Negates a Target's Guilt is Consistent With the Court's Exercise of its Supervisory Powers.

Petitioner claims that "[t]he court of appeals' holding that an indictment may be challenged because of the prosecutor's failure to disclose exculpatory evidence to the grand jury cannot be reconciled with the principles underlying *Costello* and *Calandra*."[14] Pet. Br. at 17. Petitioner's reading of *Calandra* and *Costello* ignores this Court's decision in *Bank of Nova Scotia* and, if taken at face value, renders the decision in *Bank of Nova Scotia* meaningless. As is discussed in greater detail below, this Court in *Bank of Nova Scotia* expressly recognized the propriety of dismissal of an indictment, pursuant to a

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[13] This Court has recognized that where certiorari was granted for a conflict between the circuits, but further review demonstrates that a conflict is nonexistent, the writ may be dismissed as improvidently granted. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 78-79 (1955); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923).

[14] Once again, petitioner mischaracterizes the court of appeals' holding. The Tenth Circuit did not hold that an indictment may be challenged because of the prosecutor's failure to disclose exculpatory evidence to the grand jury. No court has so held.

court's supervisory power, where "there was any misconduct by the prosecution that otherwise may have influenced substantially the grand jury's decision to indict, or whether there is grave doubt as to whether the decision to indict was so influenced." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 259 (1988).

In *United States v. Fulmer*, 722 F.2d 1192 (5th Cir. 1983), the Fifth Circuit discussed the standard to be applied by the district court in considering whether dismissal of an indictment on grounds of government misconduct should be with or without prejudice. After observing that dismissal of an indictment with prejudice represents an extreme sanction which should be applied only in extraordinary situations, the court stated:

> For this reason, we have held that a district court may dismiss an indictment with prejudice only where it has been shown that governmental misconduct or gross negligence in prosecuting the case has actually prejudiced the defendant.

Id. at 1195.

In *Fulmer*, the district court dismissed the indictment with prejudice because of various "blunders" committed by the government before the grand jury. The case involved the presence before the grand jury of an FBI agent who was not a sworn witness and thus was not authorized to be present. The *Fulmer* court properly concluded that the government's "ineptitude" in handling the case was not so grossly negligent as to bar further prosecution. *Id.* In so holding, the court recognized the

issue as being one of "actual prejudice," whether caused by governmental misconduct or gross negligence.

This Court addressed the issue of the prejudice which must be shown as a predicate to the district court's exercise of its supervisory powers to dismiss an indictment on the basis of prosecutorial misconduct in *Bank of Nova Scotia*. There, the Court affirmed the Tenth Circuit's determination that the prosecutorial misconduct involved was insufficient to warrant dismissal of the indictment. The Tenth Circuit's opinion, reported as *United States v. Kilpatrick*, 821 F.2d 1456 (10th Cir. 1987), *aff'd*, 487 U.S. 250 (1988), concluded in part that prejudice to the defendant must be shown before a court can exercise its supervisory powers to dismiss an indictment on the basis of prosecutorial misconduct. 821 F.2d at 1473-75.

In *Bank of Nova Scotia*, the Court initially addressed the "standard of prejudice" which should be applied by district courts where dismissal of an indictment is requested prior to the conclusion of the trial. The Court stated that where dismissal is sought for non-constitutional error, it would adopt the standard articulated by Justice O'Connor in her concurring opinion in *United States v. Mechanik*, 475 U.S. 66 (1986):

> Under this standard, dismissal of the indictment is appropriate only "if it is established that the violation substantially influenced the grand jury's decision to indict," or if there is "grave doubt" that the decision to indict was free from the substantial influence of such violations.

Bank of Nova Scotia, 487 U.S. at 256.

Justice Kennedy then proceeded to consider the nature of the government misconduct at issue in that case. The issues essentially involved the alleged misuse of IRS agents, the "mistreatment" of an expert witness for the defense, the defendants' claim that summaries utilized by IRS agents were inaccurate, and the grant of "pocket immunity" to certain grand jury witnesses. *Id.* at 260. The case did not involve a prosecutor's decision to withhold substantial exculpatory evidence from the grand jury.

In considering the prejudicial effect of the misconduct alleged, the Court noted that the incidents occurred "as isolated episodes in the course of a 20-month investigation, an investigation involving dozens of witnesses and thousands of documents." *Id.* at 263. The Court concluded that the violations did not raise a substantial question with regard to the grand jury's decision to charge. The Court further noted that the nature of the errors involved could be remedied by means other than dismissal, such as contempt of court or disciplinary proceedings. *Id.*

In the final paragraph of the decision, Justice Kennedy delivered the Court's ruling as follows:

> We conclude that the District Court had no authority to dismiss the indictment on the basis of prosecutorial misconduct absent a finding that petitioners were prejudiced by such misconduct. The prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict. If violations did substantially influence this decision, or if there is grave doubt that the decision to indict was

> free from such substantial influence, *the violations cannot be deemed harmless.*

Id. (emphasis added).

The governing standards were presented to the district court in conjunction with the respondent's motion to dismiss. At page 2 of its November 7 Order, the trial court expressly noted that its decision was "guided by the standard of dismissal recently articulated by the United States Supreme Court in *Bank of Nova Scotia* . . . and by the decisions of this Circuit regarding exculpatory evidence." Pet. App. 20a. After a careful analysis of the substantial exculpatory evidence in the possession of the government yet not presented to the grand jury, the district court concluded:

> The information withheld *raises reasonable doubt about the Defendant's intent to defraud.* The absence of this substantial exculpatory evidence on perhaps the most crucial element of the crime charged *renders the grand jury's decision to indict gravely suspect.*

Id. at 26a (emphasis added).

As noted, in *Bank of Nova Scotia* this Court expressly adopted the standard articulated in *Mechanik* finding dismissal of an indictment appropriate where the subject violation substantially influenced the grand jury's decision to indict or if there is "grave doubt" that the decision to indict was free from substantial influence of such violations. The district court's conclusion here was that the absence of the subject exculpatory evidence rendered the grand jury's decision to indict "gravely suspect." This is precisely what *Bank of Nova Scotia* held amounted to

"prejudice." 487 U.S. at 263. *See also United States v. Soberon*, 929 F.2d 935, 939 (3d Cir. 1991) (prejudice requires that the district court establish a violation which substantially influenced the grand jury's decision to indict or that there is grave doubt that that decision was free from such influence).

This is not a case where dismissal of the indictment was ordered merely because of some procedural irregularity before the grand jury. *See, e.g., United States v. Phillips Petroleum Co.*, 435 F. Supp. 610, 618 (N.D. Okla. 1977) ("slightest intrusion of an unauthorized person into a Grand Jury proceeding voids the indictment"); *United States v. Bowdach*, 324 F. Supp. 123 (S.D. Fla. 1971) (FBI agent recalled to play tape recordings to refresh memory of tesifying witness); *United States v. Borys*, 169 F. Supp. 366 (D. Alaska 1959) (mother of child present while child testified). Here, the government infringed upon the grand jury's independent judgment and "render[ed] the grand jury's decision to indict gravely suspect." Pet. App. 26a.

As noted, this Court has expressly recognized that a district court's supervisory power may properly be exercised to dismiss an indictment for non-constitutional error. In *Bank of Nova Scotia*, though the facts did not warrant such a dismissal, the Court suggested that the finding that prosecutors knowingly utilized false or misleading evidence before the grand jury, or caused government agents to testify falsely, might give rise to a finding of prejudice. 487 U.S. at 259-60. These conclusions do not

conflict with *Calandra* or *Costello*.[15] The analysis focuses on the prosecutor's conduct, not the sufficiency or competence of evidence considered by the grand jury. *E.g., United States v. Isgro*, 751 F. Supp. 846, 851-52 (C.D. Cal. 1990); *United States v. Lawson*, 502 F. Supp. 158 (D. Md. 1980); *United States v. Provenzano*, 440 F. Supp. 561 (S.D.N.Y. 1977); *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977).

The prosecutor's failure to present substantial exculpatory evidence in this case substantially influenced the grand jury's decision to indict, or left grave doubt that the decision to indict was free from such influence.[16]

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[15] In *Costello*, the Court found there were no "persuasive reasons" for exercising the supervisory power to establish a rule overturning a conviction based upon an indictment obtained with hearsay evidence. That cannot be said of this case. *See generally* Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 Mich. L. Rev. 463 (1980).

[16] The district court's conclusion that the government withheld substantial exculpatory evidence was a finding of fact. Pet. App. 4a. The court of appeals held that that finding was not clearly erroneous. Pet. App. 14a. This Court accords great weight to a finding of fact which has been made by a district court and affirmed by a court of appeals. *E.g., NCAA v. Bd. of Regents of Univ. of Ok.*, 468 U.S. 85, 98 n. 15 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). Petitioner does not ask this Court to set aside any factual findings of the district court; instead petitioner argues that the lower courts erred as a matter of law.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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